SOLAR GAS SDN BHD v. NGC ENERGY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[SUIT NO: WA-22NCVC-818-11-2019]
11 AUGUST 2022

Abstract – *The domestic liquefied petroleum gas ('LPG') market in Malaysia is a saturated market, with only six main oil companies, all of which is in the same segment of the market, having to deal with fixed retail price for LPG, thus presenting limited potential for growth. The industry practice in relation to the collection and exchange or return of LPG cylinders is undertaken to ensure that LPG cylinders of different brands can be picked up by different oil companies and dealers and, ultimately, circulated back to other oil companies or other dealers. Although it does not have force of law, such practice is widely used that it is accepted as a norm and behaviour within the industry.*

TORT: *Conversion – Claim – Allegation that alleged tortfeasor unlawfully, without consent of claimant, came into possession of gas cylinders and continued to unlawfully keep them – Whether practice in line with industry practice – Whether conduct of alleged tortfeasor inconsistent with rights of claimant as owner of cylinders – Whether conduct deliberate, not accidental – Whether conduct excluded claimant from use and possession of gas cylinders – Whether tort of conversion established*

CIVIL PROCEDURE: *Pleadings – Cause of action – Cause of action premised upon tort of conversion – Allegation that alleged tortfeasor unlawfully, without consent of claimant, came into possession of gas cylinders and continued to unlawfully keep them – Claimant's strong position that alleged tortfeasor abused industry practice – Whether abuse of industry practice pleaded*

The plaintiff was involved in the business of the importation, bottling, wholesale, marketing and distribution of liquefied petroleum gas ('LPG') products to various dealers for use by domestic households, commercial and industrial end user in Peninsular Malaysia. According to the plaintiff, (i) the defendant unlawfully, without the consent of the plaintiff, came into possession of the LPG gas cylinders from the defendant's distributors and/or dealers and/or other third parties and continued to unlawfully keep them at the defendant's depot; (ii) the defendant was in possession of 94,756 LPG gas cylinders belonging to the plaintiff. During the collection of the plaintiff's LPG gas cylinders at the defendant's depot, it was discovered that the defendant was hoarding about 900 units of 50kg LPG gas cylinders. In addition, there were about 1,000 units or more of 12kg LPG gas cylinders

A left in the yard of the defendant's depot, exposed to the elements and were in severely damaged conditions. In the present action, the plaintiff sought, *inter alia*, an injunction compelling the defendant to return the plaintiff's LPG gas cylinders or, in the alternative, to make payments at the rate of RM98.40 per unit of usable LPG gas cylinders and RM10.50 per unit of unusable LPG B cylinders. In its counterclaim, the defendant demanded that the plaintiff pay for (i) the return of the LPG gas cylinders at the rate of RM80 being the price for one usable LPG gas cylinders and RM10 being the price of scrap value for one unusable LPG gas cylinder; and (ii) storage costs that the defendant had to bear at RM0.21 per LPG gas cylinder per month from the date of C judgment until all the LPG gas cylinders were fully-collected by the plaintiff. While admitting that it was indeed in possession of 83,956 LPG gas cylinders belonging to the plaintiff, the defendant denied that there was any wrongdoing as such practice was in line with the industry's practice since the plaintiff's cylinders were exchanged in the market for the defendant's LPG gas cylinders *in lieu* of deposit. The plaintiff, on the other hand, argued that D the defendant had abused industry practice by effecting cylinder exchanges to secure a large number of the plaintiff's LPG gas cylinders. The plaintiff pointed an example where the defendant had conducted cylinder exchanges with three of its own dealers.

E **Held (dismissing plaintiff's claim; allowing defendant's counterclaim):**

(1) The question of whether or not the defendant had committed a tort of conversion for the plaintiff's LPG gas cylinders, held by the defendant, had so much to do with whether the industry practice, as raised by the defendant, was in existence. This industry practice concerned a F longstanding arrangement in the market on the collection and exchange or return of LPG gas cylinders. The plaintiff confirmed that industry practice existed even to the extent that the plaintiff's own authorised dealers and sub-dealers had also participated in the said industry practice. (paras 22, 23 & 32)

G **(2)** There was no clear evidence that, when conducting the cylinder exchanges with the three dealers, the defendant had intended or targeted to deprive the plaintiff of its LPG gas cylinders. Even the plaintiff's own witnesses agreed that the defendant had never tried to hide the LPG gas cylinders from the plaintiff. On the contrary, it was apparent that the H defendant was ready, willing and able to return the LPG gas cylinders to the plaintiff, provided that it was carried out in accordance with the industry practice. As it was not part of the plaintiff's pleadings nor cause of action, the allegation that the exchanges that took place between the defendant and its own dealers were *mala fide* and an abuse was not I adequately substantiated. (paras 43 & 67)

(3) The plaintiff must prove, on a balance of probabilities three principal elements in order to found a case in conversion of the LPG cylinders against the defendant, namely that the defendant's conduct was: (i) inconsistent with the rights of the plaintiff who was the owner of the cylinders; (ii) deliberate, not accidental; and (iii) so extensive an encroachment on the rights of the plaintiff as to exclude the latter from the use and possession of the said cylinders. Whilst the plaintiff's cause of action was for the tort of conversion, it was taking a strong position in its claim in respect of the allegation of the defendant abusing industry practice, which was not even pleaded. This weakened the plaintiff's case. The plaintiff patently failed to discharge the burden of proof in respect of its claim for conversion. It was not established, on a balance of probabilities, that the defendant had wrongfully taken, sold, retained, misused, destroyed or denied access to the plaintiff's LPG cylinders and that the defendant had asserted dominion over the LPG gas cylinders in a manner that was inconsistent with the rights of the plaintiff. (paras 21, 80, 108 & 109)

Case(s) referred to:

Coolrich Engineering (M) Sdn Bhd & Anor v. Protection Rigging Access Services Sdn Bhd & Ors [2018] 1 LNS 2171 HC ***(refd)***

Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor [1985] 1 LNS 44 FC ***(refd)***

Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***

KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***

KSK Sawmill Sdn Bhd v. FW Solutions Sdn Bhd [2020] 1 LNS 474 CA ***(refd)***

Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri [2019] 2 CLJ 772 CA ***(refd)***

Manders v. Williams [1849] 3 Ex 339 ***(dist)***

National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2014] 2 CLJ 445 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiff - Sunther Tulasi & Ahmad Amir Mahmood; M/s Amir & Rajpal Ghai
For the defendant - Ong Boo Seng, Amos Khaw Aik Ween & Wong Jie Le; M/s Zaid Ibrahim & Co

Reported by Najib Tamby

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JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

B **[1]** This is a writ action by the plaintiff predicated on the tort of conversion against the defendant in respect of the plaintiff's liquefied petroleum gas (LPG) cylinders under the brand name of "Solar Gas". The defendant counterclaimed for payment for the return of the said cylinders to the plaintiff.

C **[2]** At the conclusion of the trial which was at the start conducted physically in open court but later in light of the COVID-19 pandemic, proceeded by way of a remote communication technology *via* Zoom, I found that the plaintiff has not succeeded in proving its case of conversion against the defendant, and therefore dismissed the claim, but allowed the counterclaim of the defendant, and highlighted the main grounds for my D decisions. This judgment contains the full reasons for the same.

Key Background Facts

[3] The salient facts of the case, consistent with the pleadings of the plaintiff are as follows.

E **[4]** The plaintiff is involved in the business of importation, bottling, wholesale, marketing and distribution of liquefied petroleum gas (LPG) products to various dealers under its brand name "Solar Gas" for use by domestic households, commercial and industrial end users in Peninsular Malaysia.

F **[5]** On a date unknown to the plaintiff but before 9 July 2019, the defendant, according to the plaintiff, unlawfully without the consent of the plaintiff came into possession of the said LPG gas cylinders from the defendant's distributors and/or dealers and/or other third parties and continued to unlawfully keep them at the defendant's depot in Ipoh, Perak G and Lukut, Negeri Sembilan.

[6] It had come to the plaintiff's knowledge that as of 9 July 2019, the defendant was in possession of 94,756 LPG gas cylinders belonging to the plaintiff. During the collection of the plaintiff's LPG gas cylinders at the H defendant's depot in Ipoh from 25 January 2021 until 8 February 2021, the plaintiff's representatives discovered that the defendant was hoarding about 900 units of 50kg LPG gas cylinders (or commercially known as C-50) belonging to the plaintiff. In addition, there were about 1,000 units or more of 12kg LPG gas cylinders (or commercially known as C-12) left in the yard exposed to the elements and were in severely damaged conditions. I

[7] In view of the defendant's wrongful and continued possession of the said LPG gas cylinders, the plaintiff by its solicitors' letter dated 14 August 2019 demanded the defendant to return the said LPG gas cylinders and for the defendant to bear the cost of returning the same or in the alternative for the defendant to pay to the plaintiff as follows:

(i) RM9,052,800 being the price 92,000 LPG gas cylinders at the rate of RM98.40 per gas cylinder; and

(ii) RM28,938 being the scrap value of the 2,756 unusable LPG gas cylinder at the rate of RM10.50 per cylinder.

[8] By a letter dated 30 August 2019, the defendant through its solicitors, denied there is any wrongdoing in withholding the LPG gas cylinders and stated that it was in line with the industry's practice in withholding the LPG gas cylinders as the plaintiff's cylinders were exchanged in the market for the defendant's LPG gas cylinders *in lieu* of deposit.

[9] The defendant in the aforesaid letter admitted that they were in possession of 83,956 LPG gas cylinders belonging to the plaintiff. The defendant however refused to return the LPG gas cylinders and demanded from the plaintiff to pay the followings for the release of the same:

(i) RM6,496,000 being the deposit for the 81,200 units of the plaintiff's LPG gas cylinders (usable) *ie*, RM80 being the current deposit rate per cylinder; and

(ii) RM272,560 for the 2,756 units of unusable plaintiff's LPG gas cylinders which are to be scrapped.

Reliefs Prayed For By The Plaintiff

[10] Even though the claim was initially filed in respect of the C-14 cylinders totalling 94,756 units of Solar Gas cylinders, given the defendant's admission that it was in possession of 83,956 units of C-14 Solar Gas cylinders belonging to the plaintiff, the plaintiff amended its statement of claim to include 900 units of C-50 and about 1,000 units or more of C-12 Solar cylinders. In the premises, the plaintiff alleged that the defendant converted the LPG gas cylinders belonging to the plaintiff thereby depriving the plaintiff of the use of the same. This caused the plaintiff to suffer loss and expense, as follows.

Particulars:

(i) replacement cost for RM7,990,080 being the price of the 81,200 LPG gas cylinders at the rate of RM98.40 per gas cylinder;

(ii) loss of profit to be assessed by this court; and

(iii) loss of the scrap value of RM28,938 for the 2,756 unusable LPG gas cylinders at the rate of RM10.50 per cylinder.

[11] As such, the plaintiff prays for judgment against the defendant for the following:

(i) an injunction compelling the defendant, his agents and/or servants to return 83,956 LPG gas cylinders belonging to the plaintiff within 14 days from the date of the order;

(ii) or in the alternative, the defendant pays the plaintiff a sum of RM8,019,018 calculated as follows:

(a) RM7,990,080 being the price of the 81,200 LPG gas cylinders at the rate of RM98.40 per gas cylinder; and

(b) RM28,938 being the scrap value of the 2,756 unusable LPG gas cylinders at the rate of RM10.50 per gas cylinder.

(iii) damages of loss profit to be assessed by this court;

(iv) interest at the rate of 5% per annum on the sum of RM8,019,018 from 30 August 2019 to date of satisfaction of judgment sum;

(v) damages for conversion;

(vi) cost of this action; and

(vii) such further or other relief deemed just and expedient by this court.

[12] The plaintiff is therefore principally seeking for, amongst others, an injunction compelling the defendant to return the Solar Gas cylinders or in the alternative, to make payment for the Solar Gas cylinders at the rate of RM98.40 per unit of usable Solar Gas cylinder, and RM10.50 per unit of unusable Solar Gas cylinder.

The Key Defence of the Defendant And Its Counterclaim

[13] The defendant denied any conversion. It argued that it was at all material times willing, able and ready to perform cylinder exchanges of the Solar Gas cylinders for the defendant's MIRA Gas cylinders or *in lieu* of the exchange, to carry out a cylinder buy-back as proposed by the plaintiff. The defendant maintained it had not acted in a manner inconsistent with the plaintiff's rights and that it merely observed the applicable longstanding practice in the LPG industry.

[14] As such, whilst the plaintiff had no right to immediate possession of the said cylinders, it was, according to the defendant, untrue that the defendant had intended to detain the Solar Gas cylinders or to deprive the plaintiff of the use of the Solar Gas cylinders.

[15] The defendant instead contended that the plaintiff had clearly represented to the defendant that the plaintiff intended to buy-back the Solar Gas cylinders and that the defendant had relied on such representations. For this reason, the defendant's position was that the plaintiff ought to be estopped from changing its position and would therefore be required to follow through and conduct the buy-back and the scrapping of unusable cylinders.

[16] This was what the counterclaim of the defendant against the plaintiff sought to achieve, specifically for the following principal reliefs. The first was for the plaintiff to make payment for the return of the Solar Gas cylinders at the rate of RM80 being the price for one usable Solar Gas cylinder, and RM10 being the price or scrap value for one unusable Solar Gas cylinder. Secondly was for the payment by the plaintiff of the storage costs that the defendant had to bear, at RM0.21 per Solar Gas cylinder per month from the date of judgment until all the Solar Gas cylinders were fully collected by the plaintiff.

The Trial

[17] At the trial of the claim, which went on for six days, the plaintiff called four witnesses, and the defendants, six. The plaintiff's witnesses were:

(i) Soong Yi Kheng, the area sales manager for the plaintiff company (PW1);

(ii) Azman bin Abdullah, the plaintiff's chief executive officer (PW2);

(iii) Helmy Shahrul Zakaria, the plaintiff's senior manager, business and customer relations (PW3); and

(iv) A Nathan a/l M Arumugam, the plaintiff's plant superintendent at Westport (PW4).

[18] The defendant's six witnesses were:

(i) Sundararajan a/l Subramaniam, the defendant company's head of sales and marketing (DW1);

(ii) Andrew Sugatharan a/l James Kuttan, the defendant's general manager (DW2);

(iii) Farouk Iskandar Mohd Khalid, manager of human resources, LPG Business Division, Petronas Dagangan Berhad (DW3);

(iv) Yeo Siew Thye, a retiree, previously an LPG dealer since 1967 (DW4);

(v) Khairunnazarullah bin Mohammad Appendi, a retiree (DW5), previously a Petronas Dagangan Berhad's LPG sales manager for the southern region; and

A (vi) Fizal Sabillah bin Abu Bakar, a dealer of cooking gas for the defendant, in respect of Mira Gas (DW6).

Evaluation And Findings Of This Court

The Tort Of Conversion – Whether Proved?

B **[19]** The principles of the tort of conversion may be found in the judgment of the Federal Court in *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; [2014] 2 MLJ 799 as follows:

> [51] In *Kuwait Airways Corp v. Iraqi Airways Co* [2002] 2 WLR 1353 at p. 1366, Lord Nicholls established these propositions.
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> 39 ... I need not repeat the journey through the textbooks and authorities on which your Lordships were taken. *Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well-nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with* D *the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods*. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
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> 40 The judicially approved description of the tort in Clerk & Lindsell encapsulates, in different language, these basic ingredients. The flaw in IAC's argument lies in its failure to appreciate what is meant in this context by 'depriving' the owner of possession. This is not to be understood as meaning that the F wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in a case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer.
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> 41 Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of H conversion if he intended to exercise dominion over them, but not otherwise: see *Fouldes v. Willoughby* (1841) 8 M & W 540.
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> 42 Similarly, mere unauthorised retention of another's goods is not conversion of them. *Mere possession of another's goods without title is not necessarily inconsistent with the rights of the owner. To constitute conversion detention must be adverse to the owner, excluding him from the goods. It must* I

> *be accompanied by an intention to keep the goods. Whether the existence of this intention can properly be inferred depends on the circumstances of the case.* A demand and refusal to deliver up the goods are the usual way of proving an intention to keep goods adverse to the owner, but this is not the only way.
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> (see also *Law Debenture Trust Corporation Plc v. Concord Trust And Others* [2007] EWHC 1380 (Ch), where the *court held that the usual way of showing conversion is by proving a refusal to surrender the property on demand).*
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> [52] Apart from *Kuwait Airways Corp v. Iraqi Airways Co*, a long line of authorities also say that when a defendant manifests an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff, he converts the goods to his own use (see *Fairfax Gerrard Holdings Ltd And Others v. Capital Bank Plc* [2006] All ER (D) 380); *BMW Financial Services (GB) Ltd v. Bhagwanani* [2007] EWCA Civ 1230; *Club Cruise Entertainment And Travelling Services Europe BV v. Department for Transport* [2008] EWHC 2794 (Comm), *Thunder Air Ltd v. Hilmarsson* [2008] All ER (D) 245 (Mar); and *White v. Withers LLP* [2009] EWCA Civ 1122).
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> [53] *A conversion is a voluntary act by one person inconsistent with the ownership rights of another.* 'A conversion is the act of wilfully interfering with movable property without lawful justification whereby any person entitled thereto is deprived of the possession of it ... And that the defendant's act may amount to conversion although he has not acted on his own account or converted to his own use ... In order that this article may apply to suits for relief in respect of property acquired by conversion, it is not necessary that the conversion should have been a dishonest one' (*The ALR Manual* (4th Ed), Vol 24 p 821). With respect to shares, appropriation of a share certificate has been held as conversion (*African Strategic Investment (Holdings) Ltd v. Main* [2011] EWHC 2223 (Ch)). In the instant case, it was more than mere appropriation of the share certificate. It was a dealing of the property of KCH by the fourth appellant that was wholly inconsistent with the ownership rights of KCH. And those shares were not returned despite the demand by the members of KCH at its 2007 EGM to the fourth appellant to return the same. There could not be a clearer case of conversion.
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> (emphasis added)

[20] Based on the above, as well as other authorities on the subject, including the High Court decision in *Coolrich Engineering (M) Sdn Bhd & Anor v. Protection Rigging Access Services Sdn Bhd & Ors* [2018] 1 LNS 2171; [2019] 11 MLJ 111, a case referred to by the plaintiff, the plaintiff in the instant case must prove on a balance of probabilities three principal elements in order to found a case in conversion of the said Solar Gas cylinders against the defendant.

[21] First, the defendant's conduct was inconsistent with the rights of the plaintiff who is the owner of the said Solar Gas cylinders. Secondly, the defendant's conduct was deliberate, not accidental, and thirdly, the

defendant's conduct was so extensive an encroachment on the rights of the plaintiff as to exclude the latter from the use and possession of the said cylinders.

Relevance Of Industry Practice

[22] In my view, the question of whether or not the defendant had committed a tort of conversion for the Solar Gas cylinders held by the defendant has much to do with whether the industry practice as first raised by the defendant is in existence. This industry practice concerns a longstanding arrangement in the market on the collection and exchange or return of LPG cylinders as described in the pleadings of the defendant.

[23] As stated in the defence statement, the industry practice in respect of the collection and exchange or return of LPG cylinders involved the LPG suppliers distributing cylinders filled with LPG through their respective distributors. The distributors will then pay the LPG supplier a deposit for each cylinder taken.

[24] Thereafter, the distributors will distribute the LPG cylinders to end-customers who will in turn pay a deposit for the cylinders. And when the LPG cylinder is empty, the end-customer may choose to continue with the same LPG supplier or obtain LPG from a new supplier. If the end-customer chooses to buy LPG from a new LPG supplier, the new supplier's distributor may take the empty cylinder in exchange for the new supplier's LPG cylinder, where the end-customer does not need to pay any deposit for the new cylinder. This practice facilitates the easy supply of LPG to end-customers and promotes competition.

[25] The new supplier's distributors may exchange the empty cylinders in the market, or may send these cylinders to the new supplier in exchange for the latter's cylinders, in which case, the distributor does not pay any deposit for the new cylinder. The new supplier may then communicate with the existing supplier to either return the existing supplier's cylinder in exchange for the new supplier's cylinder; or *in lieu* of exchange, the existing supplier may pay the new supplier a sum equivalent to the deposit for a cylinder given that the new supplier would have given out its cylinder in exchange for the existing supplier's cylinder.

[26] If the existing supplier's cylinder is no longer usable due to safety issues, it may allow the new supplier to scrap the cylinder and the residual value (after deducting the scrapping cost) is shared between the existing and new suppliers at an agreed rate.

[27] The defendant's witnesses, DW4, DW5 and DW6, all gave evidence that the taking in of empty LPG cylinders of other oil companies and giving out its own filled cylinders in exchange is indeed part of the industry practice.

[28] The defendant's own LPG dealers had approached the defendant to conduct the cylinder exchanges. Documentary evidence confirms numerous cylinder exchanges and buy-backs between the defendant and other oil companies or LPG dealers had taken place over the years.

[29] It is observed that the plaintiff agreed that the industry practice has been followed for many years by all LPG suppliers in Malaysia including Petronas, BHP and the plaintiff, and the undeniable purpose of the same is essentially to ensure that the end users have sufficient gas in circulation in the market for their use.

[30] Evidence of witnesses confirms that this industrial practice basically concerns the relationship between the oil company and the distributor whereby a distributor has to pay a deposit in order to collect a cylinder for distribution in the market, pegged at RM80 per cylinder, which is also referred to as the value of the cylinder.

[31] In light especially of witness testimonies given at trial, I cannot but conclude that there is indeed industry practice in relation to the collection and exchange or return of LPG cylinders, which primary objective is to ensure that consumers would always have the supply of LPG. The cylinder exchanges and buy-backs would allow the LPG cylinders of different brands to be collected by different oil companies and dealers which would then circulate these cylinders back to other oil companies or dealers.

[32] Despite its apparent denial initially, the plaintiff has also during trial agreed to the existence of the industry practice. I find that the plaintiff confirmed that industry practice exists even to the extent that the plaintiff's own authorised dealers and sub-dealers have also participated in the said industry practice.

[33] Evidence from witnesses show, that both oil companies and LPG dealers are involved in cylinder exchanges and buy-backs, and that it is part of industry practice to accept cylinders of other oil companies and to give out its own filled cylinders in exchange.

[34] Evidence also shows that cylinder exchanges and buy-backs between the defendant and other oil companies or LPG dealers have taken place over the years.

[35] It bears repetition that based especially on the evidence led by DW1, it seems clear that the industry practice in relation to the collection and exchange or return of LPG cylinders is undertaken to achieve the objective that consumers will always have the ready supply of LPG. This is the reason as to why the cylinder exchanges and buy-backs are in place, which is to ensure that LPG cylinders of different brands can be picked up by different oil companies and dealers, and subsequently or ultimately then circulated back to other oil companies or other dealers.

[36] The background is the domestic LPG market in this country is a saturated market, with only six main oil companies, all of which are in the same segment of the market, having to deal with fixed retail price for LPG, thus presenting limited potential for growth.

[37] In order to increase revenue and grow sales, therefore, DW1 testified that the general strategy would be for the oil company to substitute its competitor's LPG with its own LPG. This is also supported by the evidence of DW4, who can be considered as an independent witness, who testified that such exchanges which were to increase the market share by increasing sales are not unusual. On top of that, the plaintiff's own witnesses, PW1 and PW2, confirmed that the displacement of a competitor's cylinders is part of the process of expanding one's own market.

Whether There Was Abuse Of Industry Practice

[38] Now, the key complaint of the plaintiff is that the defendant has misused the industry practice to expand its business.

[39] The plaintiff alleged that the defendant abused industry practice by effecting cylinder exchanges to secure a large number of the plaintiff's Solar Gas cylinders. The contention is that the exchanges involving more than 1,000 cylinders is an abuse of industry practice. It was pointed out for example that the defendant had conducted cylinder exchanges with three of its own dealers namely, Dima Brothers Trading, Southern Gas Trading and Perniagaan Maliga. These dealers also distributed the LPG cylinders of other oil companies, including the plaintiff, and they had obtained the plaintiff's LPG from the plaintiff's main dealer, Edaran Budiman Perkasa.

[40] The defendant, according to the plaintiff, collected 80,000 Solar Gas cylinders belonging to the plaintiff from one of the defendant's dealers, Dima Brothers Trading in Johor Bahru. Dima Brothers Trading planned to move its inventory and give it back to its principal, Edaran Budiman Perkasa, from whom Dima Brothers Trading secured the Solar Gas cylinders. However as stated by DW1, Edaran Budiman Perkasa declined to accept the empty cylinders from Dima Brothers Trading.

[41] The plaintiff also objected to this testimony by DW1 because it is hearsay in the absence of evidence from Dima Brothers Trading or Edaran Budiman Perkasa.

[42] The plaintiff did not however substantiate its assertion. On the contrary, the defendant was correct in pointing out that PW2, the plaintiff's own CEO stated that the displacement of a competitor's cylinders is part of growing or expanding one's market. PW2 also plainly confirmed that the more cylinders injected into the market would be better, and there were also no prescribed numbers of cylinders that can be so injected.

[43] And I find no clear evidence that, when conducting the cylinder exchanges with Dima Brothers Trading, Perniagaan Maliga and Southern Gas Trading in 2017 and 2018, the defendant had intended or targeted to deprive the plaintiff of its Solar Gas cylinders. The plaintiff's own witnesses, PW2 and PW3 agreed that the defendant has never tried to hide the Solar Gas cylinders from the plaintiff. On the contrary, it is apparent that the defendant was at all material times ready, willing and able to return the Solar Gas cylinders to the plaintiff, provided it was carried out in accordance with the industry practice.

[44] The plaintiff argued that the empty cylinders ought to have been returned to the plaintiff because it was said that the plaintiff had the immediate right to possession of those cylinders so that the cylinders could be filled and returned to the market for circulation. Since the cylinders can only be refilled by the oil company to whom the cylinders belonged, the 80,000 cylinders which the plaintiff alleged to be in the possession of the defendant belong to the plaintiff.

[45] Further, Edaran Budiman Perkasa would return them to the plaintiff for refiling and sale in the market by Edaran Budiman Perkasa. If the defendant had exchanged the plaintiff's cylinders in the usual cause of business through its dealers as practised in the industry, this would not be objectionable since the numbers would not be more than 1,000 cylinders.

[46] The plaintiff submitted that in the normal cause of business, if Dima Brothers Trading, Southern Gas and Perniagaan Maliga wanted to change their inventory to be an absolute defendant's MIRA cylinder's dealers for the 80,000 cylinders they would have to pay a deposit of RM80 per cylinders or an aggregate total of RM6,400,000 as deposit payment to the defendant.

[47] Between July 2017 and September 2017 and between October 2017 and November 2017, the defendant had, according to the plaintiff, exchanged a total of 80,000 plaintiff's Solar Gas cylinders with the defendant's MIRA cylinders with Dima Brothers Trading, Southern Gas and Perniagaan Maliga.

[48] The plaintiff maintained that if these empty cylinders were given back to Edaran Budiman Perkasa (the plaintiff's dealer), Edaran Budiman Perkasa would have immediately returned the empty cylinders to the plaintiff to be refilled and re-circulated into the market. This would mean that the exchange by the defendant was *mala fide* and an abuse of the actual intention of industry practice which was to create market harmony and encourage competition.

[49] The plaintiff stressed the point that the defendant admitted that the defendant did not collect the RM80 deposit per cylinder from Dima Brothers Trading, Southern Gas and Perniagaan Maliga, and in fact, its witness DW1 testified that Dima Brothers Trading had paid the deposit of RM80 per cylinder to Budiman.

[50] The defendant however made it clear that the actual present number of Solar Gas cylinders in its possession is 56,505 units, lower than what was stated in the pleadings of the plaintiff. This came about given the conduct of the defendant which had continued to perform cylinder exchanges and buy-backs in respect of Solar Gas cylinders. In addition, the defendant had also returned some 22,626 units to the plaintiff in compliance with the earlier injunction order of 18 February 2020.

[51] The plaintiff contended that if Dima had indeed paid the deposit and returned the cylinders to Budiman, the latter would have returned the deposit to Dima and Budiman would have also returned the empty cylinders to the plaintiff, to be in conformity with industry practice. This was the reason for the plaintiff urging this court to draw adverse inference against the defendant by invoking s. 114(g) of the Evidence Act 1950 – for the alleged omission to call any representative from Dima to confirm that deposit payment for the cylinders taken by Dima from Budiman had been made by Dima and that Budiman subsequently refused to take the empty cylinders from Dima.

[52] Furthermore, even if the deposit had been paid by Dima to Budiman, that ought not to prevent the defendant from returning the empty cylinder to Budiman and collecting the deposit from Budiman, as opposed to requesting the plaintiff to pay RM80 per cylinder to collect the plaintiff's own cylinders.

[53] The plaintiff also asserted that the collecting of the plaintiff's cylinders by the defendant from Johor Bahru and storing them in Ipoh, away from the plaintiff's stronghold and where the plaintiff lacked distributors or dealers, and thereafter selling 4,000 units of the plaintiff's Solar Gas cylinders to third parties constituted an act of conversion.

[54] Even though PW1 testified that the cylinders were taken to Lumut to ensure the plaintiff would not get back its cylinders, DW1 and DW2 explained that the cylinders were moved from the storage yard at Lukut because it had reached its maximum storage capacity and the Lukut yard was in any event in the midst of being closed.

[55] The deprivation theory was also supported by the defendant's sale of the cylinders to third parties who are non-Solar Gas dealers to ensure that cylinders sold to these third parties are not returned to the southern region.

[56] In contending that the defendant had committed conversion of its cylinders, the plaintiff argued that the plaintiff has an immediate right to possession to the Solar Gas cylinders, and that the cylinders belong to the plaintiff and can only be refilled by the plaintiff.

[57] The plaintiff referred in support of an old English case of *Manders v. Williams* [1849] 3 Ex 339. In that case, the plaintiff brewer supplied porter (stout) in casks to a publican on condition that he was to return empty casks within six months. The arrangement was that the casks would be returned to the owner when they were empty. The defendant sheriff seized and sold

a number of the casks while they were lying empty, but still unreturned, in the customer's cellar. The plaintiff commenced an action against the sheriff in trover (a cause of action in common law now subsumed under the law of conversion) to recover the value of the casks seized and sold.

[58] The court ruled in favour of the plaintiff essentially since once the casks were empty, the effect of the contract was to make the publican a bailee at will, whereupon the plaintiff was entitled to immediate possession. In other words, once the casks had been emptied, the customer publican became a bailee of them during pleasure, and the rights of property and possession in them reverted to the plaintiff who was, accordingly, entitled to recover their value from the defendant sheriff.

[59] Now, I agree however that as correctly submitted by the defendant, *Manders v. Williams* is distinguishable from the instant case before me.

[60] This is fundamentally because dealers have to pay a deposit for each cylinder it takes from the oil company. The value attached to each cylinder taken by the dealer is now with the oil company that issued the cylinder. And as mentioned earlier, if the dealer were to return a cylinder to the oil company, the oil company must either give a newly filled cylinder to the dealer or if the dealer no longer wishes to continue distributing LPG for the oil company, the dealer is entitled to his deposit paid to the oil company. As such, the interest that the dealer has in the cylinder is not determinable by the oil company in light that the oil company already holds a deposit or value for the cylinder.

[61] In contrast, in *Manders v. Williams*, the plaintiff brewer did not hold any deposit to the casks and furthermore there was an express term in the governing contract which required the casks to be returned when empty or for the publican pay for the value of the empty casks.

[62] In other words therefore, even after the LPG has been consumed, the right of possession in the said Solar Gas cylinders does not immediately revert to the oil company. At the risk of repetition, it may be stressed that an LPG cylinder has a value that is tied to the deposit that is taken when the LPG cylinder is issued out such that the supply of an LPG cylinder must be in accordance with the cylinder exchange or buy-back industry practice. No party can thus simply demand for its cylinder back without an exchange of value.

[63] The cylinders are also not held in trust as alleged, *albeit* not pleaded. I observe that no evidence has been led to support this contention of the plaintiff. I therefore found that the plaintiff has not succeeded to prove on a balance of probabilities that it is entitled to the immediate right to possession of the empty Solar Gas cylinders.

[64] But as testified by DW1, in shifting inventory to the defendant's MIRA Gas cylinders, Dima Brothers Trading, Perniagaan Maliga and Southern Gas Trading could either pay a deposit and obtain filled MIRA Gas cylinders from the defendant, or it could alternatively provide empty LPG cylinders to the defendant in exchange for the filled MIRA Gas cylinders.

[65] Even going by the plaintiff's own calculation, it would have been holding cylinder deposits in the amount of RM6,400,000 for the 80,000 Solar Gas cylinders which were in circulation. The defendant was correct in contending that the plaintiff would thus in such a scenario be unjustly enriched if the defendant were to return the empty Solar Gas cylinders without getting another cylinder in exchange or if the defendant had to pay for the Solar Gas cylinders.

[66] But as shown by the defendant, PW1 was principally involved in the execution of the approved sales plan and never part of the decision-making process. DW1 had also given evidence that the defendant's dealers had wanted to shift inventory and they had contacted the defendant for such purpose.

[67] Not part of pleadings nor a cause of action, the allegation that the exchanges that took place between the defendant and its own dealers are *mala fide* and an abuse is not adequately substantiated.

[68] In fact, I found that it is not disputed that the defendant had at all material times been ready, willing and able to conduct exchange or buy-backs with the plaintiff for the Solar Gas cylinders since 2017 up until 2019. For instance, DW1 did inform its dealers, Dima Brothers Trading, Perniagaan Maliga and Southern Gas Trading to try and return the Solar Gas cylinders to the plaintiff first.

[69] There is also substance in the argument that the plaintiff's submission that no deposit was paid by Dima for the Solar Gas cylinders contradicts the evidence given by PW2 and PW3, the plaintiff's own witnesses, including its CEO no less.

[70] The argument for the drawing of adverse inference under s. 114(g) against the defendant for failing to adduce evidence from Dima Brothers Trading on the deposits paid for the said Solar Gas cylinders is of little merit given that the plaintiff's own evidence supports the fact that deposits had been paid for the said Solar Gas cylinders.

[71] As such rightfully, regardless of from where Dima Brothers Trading obtained the Solar Gas cylinders, there would have been a deposit initially paid for those Solar Gas cylinders to the plaintiff. And in conformity with industry practice, when the Solar Gas cylinders are eventually returned by either Dima Brothers Trading or Edaran Budiman Perkasa to the plaintiff, the plaintiff must either give out a cylinder in exchange or conduct a buy-back *in lieu* of exchange.

[72] In any event, based on PW2's testimony, Budiman knew of the cylinder exchanges that had taken place between the defendant and its dealers, but neither Budiman nor the plaintiff made any attempts to approach the defendant to conduct exchanges.

[73] Although strictly industry practice does not have force of law (see *Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri* [2019] 2 CLJ 772; [2019] 2 MLJ 433) it is undeniably widely practised and accepted industry norms and behaviour relating to the collection and exchange or return of cylinders. As stated earlier, in arguing that the defendant had abused the said practice, the plaintiff clearly admitted that the industry practice exists.

[74] This must mean that it would be unconscionable for the plaintiff to ignore the defence of industry practice in pursuing its claim in conversion. In this context, reference ought to be made to the decision of the Court of Appeal in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233 which held as follows:

> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having do so, it ought not to be permitted to now contend otherwise.
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and it is now beyond question. See *Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331.

[75] And the plaintiff alleged that the defendant had committed the conversion of the Solar Gas cylinders by collecting the Solar Gas cylinders from Johor Bahru and storing them in Ipoh away from the plaintiff's key place of operations in Johor, or to where the plaintiff lacks distributors or dealers who can exchange the cylinder, thereby depriving the plaintiff of use of the said cylinders.

[76] I think this contention is likely to be an afterthought. This was never mentioned in the demand letter issued by the plaintiff's former solicitors dated 14 August 2019. It was not even stated in the statement of claim of the plaintiff.

[77] In any case, in contrast, the defendant did lead evidence as to the movement of the Solar Gas cylinders from Lukut to the defendant's storage facility in Ipoh. I observed that the defendant at trial adduced evidence that these cylinders were being moved for two key reasons – unchallenged during cross-examination – namely first, inadequate storage capacity in the defendant's Lukut plant and that secondly, the said plant was closing down anyway.

[78] Again, the plaintiff's witnesses, PW2 and PW3 themselves, admitted that they had knowledge of the Solar Gas cylinders at all times. They knew the said Solar Gas cylinders were in Lukut. But they failed to take any action, concealing the point that the defendant had been ready, willing and able to conduct the cylinder exchanges and/or buy-backs of the Solar Gas cylinders with the plaintiff and never deprived the plaintiff of access or use of the Solar Gas cylinders.

[79] The other aspect of claim in conversion against the defendant is the allegation that the defendant conducted the sale of the Solar Gas cylinders to third parties. It is difficult to follow this assertion, when it has been clearly explained that the defendant has only conducted cylinder exchanges or buy-backs of the Solar Gas cylinders, which allows the cylinders to be circulated back into the market, in accordance with the industry practice. Buy-backs, furthermore, are manifestly distinguishable from selling, especially in view of the deposit system in the industry practice.

[80] Not only that. It is clear to all and sundry that whilst the plaintiff's cause of action is for the tort of conversion, the plaintiff is taking a strong position in its claim in respect of the allegation of the defendant abusing industry practice – which is not even pleaded. This further considerably weakens the plaintiff's case.

Other Issues Against The Plaintiff

[81] The plaintiff has not denied that it has included issues in its witness statements that it had not pleaded. The defendant asked that certain parts of the PW1, PW2, and PW3's witness statements ought to be disregarded or no weight should be given to this evidence. These objections were made before each of the witness statements was signed by the witnesses and marked by the court.

[82] This was even before the statements are put in evidence. Strictly these statements cannot be construed as evidence as yet, as held by the Court of Appeal in *KSK Sawmill Sdn Bhd v. FW Solutions Sdn Bhd* [2020] 1 LNS 474; [2020] 2 MLJ 423. I had directed that parties submit on the issue at the end of the trial.

[83] In contrast, in the case referred to by the plaintiff to urge this court ignore the objections, in *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185, the objection to issues not pleaded was only made for the first time during final submissions after the conclusion of evidence whilst in *National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; [2000] 2 MLJ 144, the same was only raised on appeal, after the issue had been fully argued before the Industrial Court and High Court without objections.

[84] There is such strong merit in allowing the objections made by the defendants. In any event, the said statements would not have made any difference to the case of the plaintiff because the non-pleaded issues all concerned allegation of the abusive conduct of the defendant which has been found to be without basis, as discussed earlier.

[85] Evidence I repeat shows that the plaintiff and its largest dealer in Johor – Edaran Budiman Perkasa, knew but did not take any action at all or lodge any complaint with the defendant at the time, strongly suggests that the defendant did not conduct itself in bad faith. Further, the defendant had also informed the plaintiff of the Solar Gas cylinders in its possession in November 2017, shortly after it had come into possession of the Solar Gas cylinders.

[86] As discussed earlier, that was not all. The plaintiff's own representative had also conducted an inspection of the cylinders in Lukut during that time. And as it turned out, the plaintiff had waited until March 2021, which was almost three and a half years later, to make the allegations of *mala fide* conduct of the defendant in conducting the cylinder exchanges with its own dealers. And such allegation was not even mentioned in its letter of demand in August 2019 or even in its pleadings when it filed the action in November 2019.

[87] And I could not stress enough the importance of proper pleadings. The critical importance of parties and the court to be bound by the four corners of the pleadings of the litigants has been emphasised many times by various judicial pronouncements of high authority. I refer to relevant passages from only two relatively recent decisions by the apex court on this issue.

[88] In the Federal Court decision in the case of *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537, Richard Malanjum CJ (Sabah & Sarawak) (later Chief Justice) held thus:

A [42] Now, it is trite law that the plaintiff is bound by its own pleadings. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302 SC; *Joo Chin Kia v. Loh Seng Tek* [1987] 1 CLJ 194; [1987] CLJ (Rep) 662;
B *KEP Mohamed Ali v. KEP Mohamad Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10 FC). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place. (See *Esso Petroleum Co Ltd v. South Port Corp* [1956]
C AC 218; *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] 1 LNS 57; [1980] 2 MLJ 182 FC).

[89] In another Federal Court decision in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944, Ramly Ali FCJ held instructively as follows:

D [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and
E if it is desired to raise other issues there must be pleaded on the record by amendment.

[30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised
F in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157,
G had also pointed out that "as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered" (see also: *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26; [1956] MLJ 45; and *Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1963] 1 LNS 59; [1964] MLJ 99).

H [32] Based on the above observation and principle, we are of the view that the "last minute" issue raised by Mr Gobind Singh Deo, co-counsel for the appellant, that at the time when the sale and purchase agreements with the earlier purchasers were executed, MPM was not the registered proprietor/owner of the land must be disregarded and not to be considered at all in determining the appeal before us. In doing so, we adopt the observation by HRH Raja Azlan Shah CJ (as HRH then was)
I in *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the Defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be a great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.
>
> [33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case.
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> [34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357, "... once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an unpleaded case ..."

[90] I cannot but agree with the defendant that this un-pleaded contention of the plaintiff should therefore be ignored. In any event, as stated earlier, even if this was accepted despite being un-pleaded, it still could not help advance the case of the plaintiff in any meaningful way.

[91] There is also this assertion of a delay on the part of the plaintiff in that it did not act expeditiously to exchange or buy-back the said Solar Gas cylinders or to take any immediate steps to mitigate or remedy its loss and damage, has been sufficiently pleaded. The plaintiff instituted this suit almost 24 months later, incontrovertibly after the plaintiff was informed by the defendant, since as early as November 2017, that the defendant was holding its cylinders and even a joint inspection was conducted at the defendant's depot in Lukut on 23 November 2017.

[92] I am reminded of the decision of the Supreme Court in *Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor* [1985] 1 LNS 44; [1985] 2 MLJ 380 which held that in circumstances where there is clear evidence of laches, acquiescence and delay on the part of the plaintiff, as I agree was the case here, discretion ought not to be exercised in the plaintiff's favour. The plaintiff should thus be disentitled to the equitable relief claimed in paras. 11(i) and (ii) of its amended statement of claim.

Counterclaim

[93] I find instead for the above reasons too, that the defendant has proven its case on the counterclaim which I therefore allow, as per the counterclaim in para. 20 of the amended defence and counterclaim in encl. 96, where the price for each usable C-14 LPG cylinders should be RM55 under para. 20(1), the price of RM10 per unusable cylinder as scrap value under para. 20(2), and for the storage costs of RM0.21 per cylinder per month under para. 20(4).

A

Concluding Observations And Findings

[94] I find there is no basis to the allegation of the plaintiff that the exchange of in excess of 1,000 cylinders is an abuse of industry practice, especially also considering the evidence of the plaintiff's main witness PW2, the CEO of the plaintiff, that displacement of a competitor's cylinders is part of expanding one's market and that the more cylinders injected the better.

B

[95] Further, I agree that the contention that the cylinders exchanges that took place between the defendant and its own dealers are *mala fide* is not only insufficiently substantiated but also not even part of the plaintiff's pleadings and cause of action. In this case, the defendant's own LPG dealers had approached the defendant to undertake cylinder exchanges.

C

[96] Evidence shows that the defendant had at all material times been ready, willing and able to conduct exchange or buy-backs with the plaintiff for the Solar Gas cylinders since 2017 up until 2019. DW1 gave evidence that the defendant's dealers Dima Brothers Trading, Perniagaan Maliga and Southern Gas Trading had been informed to try and return the Solar Gas cylinders to the plaintiff.

D

[97] In fact, the testimonies of the plaintiff's own witnesses, PW2 and PW3, even contradicted the plaintiff's assertion that no deposit was paid by Dima Brothers Trading for the Solar Gas cylinders. The plaintiff's own evidence supports the fact that a deposit must have been paid for the Solar Gas cylinders.

E

[98] There is therefore no good reason for this court to invoke s. 114(g) of the Evidence Act 1950 against the defendant for failing to adduce evidence from Dima Brothers Trading on the deposits paid for the said Solar Gas cylinders. Based on industry practice as explained by witnesses at trial, there would initially have, in any event, been a deposit paid for Solar Gas cylinders to the plaintiff notwithstanding where Dima Brothers Trading obtained the Solar Gas cylinders from.

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G

[99] This also means that whenever the Solar Gas cylinders are ultimately returned to the plaintiff by either the defendant, or Dima Brothers Trading, or any other oil company or other LPG dealer, the plaintiff would have to either offer a cylinder in exchange or conduct a buy back *in lieu* of exchange.

H

[100] Even PW2 knew based on his testimony that Edaran Budiman Perkasa, the plaintiff's main dealer was aware of the cylinder exchanges that took place between the defendant and its dealers, but neither Edaran Budiman Perkasa nor the plaintiff took any steps to conduct cylinder exchanges with the defendant.

I

[101] The plaintiff argued in support of its submission that the defendant had committed the tort of conversion since the latter had moved Solar Gas cylinders from Johor Bahru and stored them instead in Ipoh where the plaintiff lacks distributors or dealers who can exchange the cylinder, thereby depriving the plaintiff of use of the cylinders. A

[102] However, the defendant has provided an explanation as supported by evidence which was in any event not challenged by the plaintiff in cross-examination on the movement of the Solar Gas cylinders from Lukut to the defendant's storage facility in Ipoh. Instead, the plaintiff who does not provide LPG exclusively in Johor in fact also operates a storage yard in Westport, Port Klang but had not taken any action on Solar Gas cylinders. B C

[103] The defendant has demonstrated that it had at all material times been ready, willing and able to conduct the cylinder exchanges or buy-backs of the Solar Gas cylinders with the plaintiff, and crucially the plaintiff's own witnesses, PW2 and PW3 also admitted that they did have knowledge of the Solar Gas cylinders at all times but failed to take any action. D

[104] And in my judgment, evidence shows that the defendant has never acted in a manner that deprives the plaintiff of access to the Solar Gas cylinders, especially since it had circulated the Solar Gas cylinders back into the market through cylinder exchanges and/or buy-backs, and had notified the plaintiff of the Solar Gas cylinders in 2017, 2018 and 2019 and had even conducted joint inspection with the plaintiff in 2017 in Lukut and in 2019 in Ipoh. E

[105] The defendant had shown they never concealed the Solar Gas cylinders from the plaintiff and it is worthy of emphasis that in fact PW2 and PW3 admitted they knew where the cylinders were stored at all material times, and even that the plaintiff does not have an immediate right to possession of the said cylinders. F

[106] The plaintiff and its own dealer in Johor knew the defendant was engaged in cylinder exchange activity with its own dealers in the normal course of business but the plaintiff did not complain then. As mentioned earlier, the defendant had informed the plaintiff of the Solar Gas cylinders in its possession in November 2017, as it came into possession of the Solar Gas cylinders, and that the plaintiff's representative had also conducted an inspection of the cylinders. G H

[107] Yet only more recently in March 2021, but not earlier when the plaintiff issued its letter of demand in August 2019 or when it filed the action in November 2019, that the plaintiff alleged *mala fide* conducts on the part of the defendant in conducting the cylinder exchanges with the defendant's own dealers. Plainly, the allegation is an afterthought and is devoid of merit. I

[108] The plaintiff has in the final analysis, patently failed to discharge the burden of proof in respect of its claim for conversion.

[109] It has not established on a balance of probabilities that the defendant had wrongfully taken, sold, retained, misused, destroyed or denied access to the Solar Gas cylinders, and that the plaintiff has not shown that the defendant had asserted dominion over the Solar Gas cylinders in a manner that was inconsistent with the rights of the plaintiff.

[110] As such, I dismissed the claim of the plaintiff, and allowed the counterclaim of the defendant in terms specified earlier, with cost of RM100,000 to the latter, as offered by the plaintiff, as against the defendant's request for RM400,000.